No. 4131

In the United States Circuit Court of Appeals

For the Ninth Circuit

WESLEY LEROY SISCHO,
Plaintiff in Error,

—VS.—

UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE E. E. CUSHMAN, *Judge*

BRIEF OF THE DEFENDANT IN ERROR

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STATEMENT OF THE CASE.

Wesley L. Sischo, plaintiff in error, but the defendant below (and hereinafter referred to as "defendant") was tried and convicted under an indictment charging him with violation of the Narcotic

Drugs Import & Export Act, and thereupon, the court sentenced him to seven years' imprisonment and to pay a fine of Four Thousand Dollars.

The evidence on behalf of the Government disclosed that at about 8:30 o'clock in the morning of the 22nd day of November, 1922, at Sylvan Beach, a small dock about ten miles from Seattle, Washington, two boxes were taken from a speed motor boat by the defendant, and were by him delivered to a deck-hand on a certain small freight boat then touching at said dock; that said boxes were billed to Seattle; that upon the delivery of the boxes, the captain of the boat asked the defendant what was in the boxes, and he replied that he had fish in them; that the captain also asked him if he had a couple of cases of "Johnnie Walker" there, and the defendant picked up one of the cases, shook it and said, "It don't rattle;" that after the freight boat left the dock the speed boat was observed to follow at some distance until a point near West Seattle had been reached; that the circumstances surrounding the shipment of these boxes had aroused the suspicions of the captain of the freight boat and he caused an examination to be made en route of the contents of the two boxes, when it was discovered that the boxes contained opium and not fish; that said boxes

were being shipped to one "B. J. Torkelson;" that at some time between Ten and Twelve o'clock of the same forenoon the defendant came to Pier 4 in Seattle, signed the name of "B. J. Torkelson" on the manifest, and paid the freight bill; that defendant was arrested very shortly thereafter, and before he had left the vicinity of the docks; that immediately after his arrest, defendant was identified by the captain, the first mate and one of the deck-hands to be the same individual who loaded the boxes on the boat; that he was also identified by the cashier at Pier 4 as the individual who signed the name of "B. J. Torkelson", and paid the freight due on the shipment; at the trial he was identified by W. D. Covington, a passenger on the boat on the morning in question, to be the individual who brought the boxes to the boat. Mrs. Mary Roth, who lived, approximately, 1500 feet from the defendant, near Harper, Washington, across the water from Sylvan Beach, and had known the defendant, approximately, five or six years, testified that at some time between Seven and Nine o'clock on the morning in question, she saw defendant going toward the beach with a wheelbarrow, hauling, what appeared to resemble, two egg cases. The unusual circumstances surrounding this entire transaction had so im-

pressed themselves upon the minds of the witnesses that their identification of the defendant and his actions was positive.

The defense interposed by the defendant was an alibi; he testified that he had not gone home on the night of the 21st of November, but had remained in Seattle, and registered at a fourth or fifth rate rooming house or a cheap hotel; that on the following morning he was called at Eight o'clock, had gotten up and had taken a street car to West Seattle, then had taken a row boat to go to his motor boat, had gotten the generator out of the motor boat and brought it back to Seattle by street car, and had gone directly to the business establishment of H. G. McLaughlin at 809 Railroad Avenue, arriving there by Nine o'clock; that he had gone from there to Pier 3 to ascertain on which days of the week he could ship freight over to his home; that while on his way to Pier 3, he noticed two customs officers going into Pier 4, and that out of curiosity, thinking that the presence of the officers at Pier 4 indicated that possibly a boat load of liquor had been brought into the harbor, he went into Pier 4 to see if that was a fact; that he had come out of Pier 4 and was going into Pier 3 when he was arrested by the officers. Defendant also admitted that he had had charge of

a motor boat from July, 1922, to November 22, 1922; that the same was a pleasure boat, that he had no special use for it other than carrying a few things back and forth occasionally; that he anchored it at West Seattle for a week at a time. The clerk of the hotel at which the defendant claimed to have stopped on the night of November 21st identified on the hotel register the signature of the defendant, and the fact that a call had been made at the room allotted to defendant at Eight o'clock in the morning. H. G. McLaughlin, the only other witness called by the defendant, testified that he believed the defendant was in his place of business on the morning of the 22nd of November, not later than 8:30 o'clock.

ARGUMENT.

The defendant below rests his claim to a new trial upon certain statements made by counsel for the government in their arguments to the jury.

On cross-examination, defendant admitted that in a Federal Court, he had been previously convicted of a crime.

Thereafter, as his counsel refused to allow further examination into the circumstances surrounding that conviction, defendant must necessarily

stand before the jury with his reputation somewhat affected and with his testimony subject to the closest scrutiny. The fact that counsel spoke of him as a convict could not affect his position in the slightest degree. The jury had seen the witnesses and had heard all of the testimony, and it is not believed that the statements of counsel, only one of which was not corrected by the Court, have in this case affected any substantial right of defendant.

In the case cited by counsel in 92 Pac. Rep. 820, the Court in the sentence immediately following the one from which counsel quotes, the Court said:

> "While this states the general rule, yet it must finally rest upon the facts of each particular case as to what matters adverted to but not in evidence are pertinent to the issues, or what immaterial matters referred to may produce injury to the substantial rights of the defendant."

If any error had been committed by counsel for the government, it was corrected by the instructions of the Court to the jury clearly and forcefully, by that portion cited by counsel for appellant, whereby the rights of the defendant were carefully safeguarded by the Court.

In the case of *Christopoulo v. United States*, 230

Fed. 788, at page 791, par. (4), the Circuit Court said:

> "The defendant was a witness in his own behalf and was asked on cross-examination if he ran a 'blind tiger,' which implied that he sold liquor unlawfully. The question was allowed over his objection and he was required to answer. In charging the jury the trial court made it plain that this evidence was admitted, not as tending in any wise to prove the offense for which defendant was on trial, but solely, in so far as it involved moral delinquency, as affecting his credibility. For this purpose, to which it was explicitly limited, the evidence was admissible, as this court has recently held in *Fields v. United States*, 221 Fed. 242, 137 C. C. A. 98."

The same Court adhered to the same ruling in *Krashowitz v. United States*, 282 Fed. 599, at page 600.

The Government contends that the balance of the cases cited by appellant are either not in point or are *obiter dicta* so far as this case is concerned.

Had this case been one purely of circumstantial evidence where the slighest influence might cause a jury to sway one way or the other, and counsel had gone into a lengthy discussion of matters not within the record, then there might be grounds for reversal,

but in this case, as the Court said in his instructions to the jury (Tr. 111):

> "The case, as both counsel have argued before you, is one of identity. If you are convinced beyond a reasonable doubt that this accused here was the man that was in possession of this narcotic drug, as has been testified to by certain witnesses, that is sufficient evidence upon which to return a verdict of guilty on both counts; but if you have any reasonable doubt in respect to his identity the defendant is entitled to the benefit of it, and an acquittal."

It was purely a question of identity. On the side of the Government were four persons, not government employees, but absolutely disinterested persons, who testified positively and without hesitation that on the 22nd day of November, 1922, they saw defendant come from the direction in which he admits he lived and personally deliver on board the freight boat, "Virginia V," the two boxes containing the opium; in addition, his neighbor saw defendant personally haul two boxes toward the beach at about the same time, and a 6th witness saw him pay the freight on the shipment and sign for it.

As against the direct and positive testimony of the witnesses for the government, the jury had for its consideration, the inconsistent, indefinite, un-

certain and rambling statements of defendant and of his two witnesses who vainly sought to save him from the trouble into which he had gotten himself.

In view of all of the testimony and of the instructions of the Court to the jury, it is hard to conceive that any of the matters complained of, even if for the sake of argument it be admitted that they were errors, could in any way have worked an injustice to the defendant in this action.

The Government submits that the defendant has had a fair and impartial trial herein and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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J. W. HOAR,
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